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Supreme Court, U.S.
FILED

Case No. _____ 93 2019 JUN 14 1994

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IVAN O.B. MORSE,

Petitioner

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the California Court of Appeals First Appellate District, Division 3

PETITION FOR A WRIT OF CERTIORARI

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108 pp

QUESTIONS PRESENTED

1. Whether the trial court's arbitrary imposition of civil penalties and cy pres restitution at summary judgment in the amount of $800,000 without first reviewing necessary evidence or allowing Petitioner the opportunity to present his defense violates the Due Process Clause of the Fourteenth Amendment.

2. Whether a statute which mandates the giving of false legal advice and which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of the opportunity for free speech is repugnant to the guaranty of liberty contained in the Fourteenth Amendment or freedoms protected by the First Amendment.

3. Whether the court's requirement that citizens perform extensive legal research to understand a statute which the court did not find clear and unambiguous violates the Due Process Clause of the Fourteenth Amendment.

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IN THE
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No.

IVAN O.B. MORSE,

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v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

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Petition for a Writ of Certiorari to the California Court of Appeals First Appellate District, Division 3

PETITION FOR A WRIT OF CERTIORARI

Ivan O.B. Morse [hereinafter "Petitioner"] respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeals, First Appellate District, Division 3.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, a1-a38) is reported at 21 Cal.App.4th 259 [Dec. 1993]. The ruling of the Superior Court of Alameda County on the motion for summary judgment of Respondent, The People of the State of California [hereinafter "Respondent"], is not reported. The transcript of the proceeding on that motion is included in the Appendix (App., infra. a39-a63) as is the court's written order, (App., infra, a64-a71). The ruling of the Supreme Court of the State of California on petition for review (App. infra, a72) is not reported.

JURISDICTION

The judgment of the California Court of Appeals, First Appellate District, Division 3, was entered on December 22, 1993. A petition for review was denied by the Supreme Court of the State of California on March 17, 1994. The jurisdiction of this court is invoked under 28 U.S.C., § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law ... abridging the freedom of speech, ..."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "... No state shall ... deprive any person of life, liberty, or property, without due process of law, ..."

California Business and Professions Code, § 17537.6 provides:

> "(a) It is unlawful for any person to make any untrue or misleading statements in any manner in connection with the offering or performance of a homestead filing service. For the purpose of this section, an "untrue or misleading statement" means and includes any representation that any of the following is true:
>
> (1) The preparation or recordation of a homestead declaration will in any manner prevent the forced sale of a judgment debtor's dwelling.
>
> (2) The preparation or recordation of a homestead declaration will prevent the foreclosure of a mortgage, deed of trust, or mechanic's lien.

(3) Any of the provisions relating to the homestead exemption set forth in Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure are available only to persons who prepare or record a homestead declaration.

(4) A homestead declaration is in any way related to the obtaining of any applicable homeowner's exemption to real property taxes.

(5) The preparation or recordation of a homestead declaration is required by law in any manner.

(6) The offeror of the homestead filing service has a file or record covering a person to whom a solicitation is made.

(7) The offeror of the homestead filing service is, or is affiliated with, any charitable or public service entity unless the offeror is, or is affiliated with, a charitable organization which as qualified for a tax exemption under Section 501(ç)(3) of the Internal Revenue Code.

(8) The offeror of the homestead filing service is, or is affiliated with, any governmental entity. A violation of this paragraph includes, but is not limited to, the following:

(A) The misleading use of any governmental seal, emblem, or other

similar symbol.

(B) The use of a business name including the word "homestead" and the word "agency," "bureau," "department," "division," "federal," "state," "county," "city," "municipal," "California," or "United States," or the name of any city, county, city and county, or any governmental entity.

(C) The use of an envelope that simulates an envelope containing a governmental check, tax bill, or governmental notice or an envelope which otherwise has the capacity to be confused with, or mistaken for, an envelope sent by a governmental entity.

(b)(1) It is unlawful to offer to perform a homestead filing service without making the following disclosure:

THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY.

YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.

RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING A HOMESTEAD DECLARATION.

IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE

YOUR SIGNATURE NOTARIZED, AND HAVE THE FORM RECORDED BY THE COUNTY RECORDER.

(2) The disclosure specified in paragraph (1) shall be placed at the top of each page of every advertisement or promotional material disseminated by an offeror of a homestead filing service and shall be printed in 12-point boldface type enclosed in a box formed by a heavy line.

(3) The disclosure specified in paragraph (1) shall be recited at the beginning of every oral solicitation and every broadcast advertisement and shall be delivered in printed form as prescribed by paragraph (2) before the time each person who responds to the oral solicitation or broadcast advertisement is obligated to pay for any service.

(c) In addition to any other service, every offeror of a homestead filing service shall deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant, but no later than 10 days after the homestead declaration is notarized. The offeror of the homestead filing service shall pay all fees charged in connection with the notarization and recordation of the homestead declaration.

(d) No offeror of a homestead

filing service shall charge, demand, or collect any money until after the homestead declaration is recorded. The total amount charged, demanded, or collected by an offeror of a homestead filing service, including all fees for notarization and recordation, shall not exceed twenty-five dollars ($25).

(e) For the purpose of this section, the following definitions apply:

(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration. "Homestead filing service" does not include any service performed by an attorney at law authorized to practice in this state for a client who has retained that attorney or an employee of that attorney acting under the attorney's direction and supervision.

(2) A "homestead declaration" has the meaning described in Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure."

STATEMENT

A. THE UNDERLYING CLAIM

On August 8, 1991, Petitioner, an attorney at law, was charged by Respondent with violating Business and Professions Code, § 17537.6 for the mailing of declared homestead solicitations to the public. Respondent filed a motion for summary judgment which was granted by the Alameda County Superior Court. This trial court imposed $400,000.00 in civil penalties, and $400,000.00 in cy pres restitution.

Petitioner's argument before the trial court was that the statute in question is unconstitutional. After the trial court found the statute in question constitutional and that Petitioner violated same, Petitioner requested to introduce evidence about his financial condition and profits he received from the alleged conduct, and further, requested a hearing so he could present evidence to determine the penalty and

restitution amounts. The trial court refused to consider such evidence and denied Petitioner his right to present his defense on penalties and restitution. Thereafter, the trial court, without any further evidence on the matter, chose to accept Respondent's arbitrary sum of 20 cents per alleged violation and invoked $400,000.00 civil penalties and $400,000.000 in restitution.

B. ARGUMENTS BEFORE THE COURT OF APPEALS

Before the Court of Appeals, Petitioner attacked the constitutionality of Business and Professions Code, § 17537.6 in many respects with the most outstanding arguments against the statute being vague and ambiguous in that the statute mandates the giving of false legal advice. Regarding the imposition of civil penalties and restitution in the total sum of $800,000.00, Petitioner relied upon cases decided by the California Supreme Court and the California Court of Appeals wherein a

determination of a defendant's financial condition, wealth and profits, should be considered when imposing penalties. Further, Petitioner argued that penalties in excess of 190 percent of Petitioner's net worth is contrary to California law as well as the United States and California Constitution.

C. THE COURT OF APPEALS' OPINION

The Court of Appeals held that Business and Professions Code, § 17537.6 was not unconstitutionally vague and ambiguous nor violative of Petitioner's Freedom of Speech guarantees under the United States and California Constitutions. The Court of Appeals stated that even if they agree with the Petitioner that the statute is uncertain, citizens are required to apprise themselves of legislative intent documents which explain these uncertainties. The Court of Appeals' interpretation of Business and Professions Code, § 17537.6 came from documents from the

Senate Committee on Judiciary which were retrieved from the Archives Building in the City of Sacramento, State of California. The Court of Appeals interpreted case law to require Petitioner to retrieve these same documents from the Archives Building in Sacramento, California in order to understand Business and Professions Code, § 17537.6.

The civil penalties and restitution were affirmed by the Court of Appeals who ruled that evidence of Petitioner's gross receipts from the alleged acts were, in and of itself, sufficient to assess a penalty and that neither the Court of Appeals nor the trial court needed to review or even consider Petitioner's financial condition, wealth and profits, or any other relevant evidence. The Court of Appeals ruled that Petitioner never made a request for the trial court to consider this evidence even though Petitioner clearly asked for "a hearing on the damages or a hearing to determine factually how much he's

made" (App., infra, a50). The Court of Appeals upheld the statute which mandated false speech, prohibited factually correct speech, and upheld civil penalties against Petitioner which are 190 percent of his net worth.

REASONS FOR GRANTING THE PETITION

The decision of the California Court of Appeals in this case denied Petitioner's rights under the Fourteenth Amendment, and it established a new test for appellate review which will result in arbitrary awards thus violating due process. The California Court of Appeals' decision is in conflict with other state and United States appellate decisions rendered, and it approved an award so grossly excessive and disproportionate to actual injury, that it constitutes a denial of due process. This court's review is therefore necessary to resolve the conflicts and to ensure that defendants in cases involving civil penalties are afforded the protection of

our laws.

A separate compelling reason exists for the court to review this case. The California Court of Appeals has upheld a statute which has confused legal scholars and which prohibits attorneys from providing free legal advice. The Court of Appeals has upheld a statute which compels an attorney to provide false legal advice to non-clients while telling the truth only to those clients who have retained his or her services. Also, the Court of Appeals' decision imposes a new extreme burden upon citizens to perform extensive legal research to understand laws which would otherwise be clearly vague and ambiguous.

A. ARBITRARY AND UNREASONABLE PENALTIES VIOLATE DUE PROCESS

A state may impose reasonable penalties as a means of securing obedience to statutes enacted by the legislature. Hale v. Morgan (1978) 22 Cal.3d 388, 398, 149 Cal.Rptr. 375,

381, 584 P.2d 512, 518. To withstand a constitutional challenge under the Fourteenth Amendment however, the penalty must be "reasonable" and not excessive. People v. Superior Court (Jayhill) (1973) 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400, Hale v. Morgan, supra.

A reviewing court cannot determine whether a civil penalty judgment is excessive without being able to review the evidence considered by the court concerning the defendant's financial condition, wealth and profits. Adams v. Murakami, (1991) 54 Cal.3d 105, 110, 115-116, 813 P.2d 1348, 284 Cal.Rptr. 318. If no such evidence is taken by the trial court, the judgment must be reversed. Forte v. Nolfi (1972) 25 Cal.App.3d 656, 102 Cal.Rptr. 455.

Petitioner presented these cases to the Court of Appeals with facts that the trial court outright refused to entertain any evidence whatsoever prior to imposing civil penalties and awarding restitution. In fact,

the trial court, as evidenced in App., infra, a56, was obviously concerned about the $800,000.00 request made by Respondent and without any other evidence or explanation other than it represented 20 cents for each alleged violation, the trial court granted Respondent's $800,000.00 request.

The Court of Appeals upheld the trial court's decision and found that when Petitioner requested the court to entertain "a hearing on the damages or a hearing to determine factually how much he's made," that it, "was not a request generally for a hearing regarding his wealth and financial condition."[1] Clearly, the Court of Appeals is splitting hairs. There is no doubt that Petitioner was requesting a hearing to present evidence to determine the civil penalties and restitution rather than be subject to an arbitrary sum. By upholding this decision,

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[1]This is the language used by the Court of Appeals in their opinion, p. 17, fn. 21.

the Court of Appeals has made a ruling inconsistent with numerous cases. It opens the door for courts to arbitrarily pick penalty amounts without any rational basis in fact.

In its further review of the civil penalty amount, the Court of Appeals concluded that the trial court had sufficient information to impose a $400,000.00 civil penalty based upon Petitioner's gross receipts of over 1.8 million. The Court of Appeals relied upon the case of Kinney v. Vaccari, (1980) 27 Cal.3d 348, 356 Fn. 6 [upholding penalty giving evidence of "monthly rental receipts"]; People ex rel. Van de Kamp v. Cappuccio, Inc., (1988) 204 Cal.App.3d 750, 765 [affirming civil penalty of $73,528.05 in light of evidence that defendant has "gross income" in 1979 of over 1.5 million]; see also Walker v. Signal Companies, Inc., (1978) 84 Cal.App.3d 982, 998 [affirming punitive damage award that was "less than one percent of gross assets at book

value of each defendant"].[2]

A closer look at each of the cases cited by the Court of Appeals reveals that the cases were either inapplicable or the courts did, in fact, review other evidence prior to determining the amount of the penalty. In the Kinney case, supra, the court was mandated by statute to award $100.00 for each day. In the case before the court today, the penalty is to range between zero and $2,500.00 and is to be assessed within the discretion of the trier of fact.

Most interesting are the cases of Van de Kamp and Walker v. Signal Companies, Inc. cited by the Court of Appeals. In Van de Kamp, the Court of Appeals, Fifth Appellate District states,

> "It is also noted the financial condition of defendants did not preclude the imposition of a fine in the amount of $73,528.05 under

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[2]These citations and contents of cases were taken verbatim from the Court of Appeals' opinion, pp. a28 and a29.

> the facts of this case." Id., 204 Cal.App.3d at 765.

In Walker v. Signal Companies, Inc., the Court of Appeals, Fourth Appellate District states,

> "The factors to be considered in assessing the award include the nature of defendant's acts, the amount of compensatory damages awarded and the wealth of a particular defendant ... When we compare the punitive damages against the wealth of each defendant, less than one percent of gross assets at book value of each defendant, the amounts assessed cannot be classified as excessive as a matter of law." Id., 84 Cal.App.3d at 997.

These are the cases cited by the Court of Appeals to evidence why the trial court was justified in making an $800,000.00 award without entertaining any evidence whatsoever other than gross receipts. The Court of Appeals claims that it can assess civil penalties solely upon Petitioner's gross receipts, and again, the Court of Appeals cited Walker v. Signal Companies, Inc. and Van de Kamp showing the relationship between gross

receipts and the penalty amount. However, in Walker v. Signal Companies, Inc., the penalty was less than one percent of gross. In the case today, the penalty is greater than 22 percent of Petitioner's gross receipts from the alleged conduct. In Van de Kamp, the court affirmed civil penalties of $73,528.05 in light of gross income over 1.5 million. In the case today, the Court of Appeals has upheld a $400,000.00 civil penalty in light of gross receipts over 1.8 million. The Court of Appeals relies upon these two cases to uphold the trial court's decision, yet the comparison in the assessment of penalties versus wealth or gross receipts are miles apart.

B. BUSINESS AND PROFESSIONS CODE, § 17537.6 MANDATES THE GIVING OF LEGAL ADVICE WHICH IS INCORRECT AND PROHIBITS ADVICE WHICH IS CORRECT

Business and Professions Code, § 17537.6 prohibits an attorney from representing to a prospective client that the recording of a homestead declaration will in any manner

prevent the forced sale of a judgment debtor's dwelling and mandates that the attorney disclose that recording a homestead declaration does not protect one's home against forced sale by a creditor. In Webb v. Trippet, (1991) 235 Cal.App.3d 647, 286 Cal.Rptr. 742, the court ruled that the declared homestead prevented the forced sale of an individual's home. The court also found the following:

> "... The California Constitution directs the Legislature to protect a portion of homestead property from forced sale. Id., 235 Cal.App.3d at 650.
>
> ... The law of homestead exemptions has since been restructured, but current law retains the distinction between declared and automatic homestead exemptions. Id., 235 Cal.App.3d at 651.
>
> ... The declared homestead exemption requires that a party record a declaration stating that the residence is the "principal dwelling" of the declarant or his or her spouse. Id., 235 Cal.App.3d at 651.
>
> ... We are persuaded, however, that Webb was entitled to have the

> validity of Combash's homestead exemption determined under the statutory law applicable to declared homestead exemptions. Id., 235 Cal.App.3d at 651.
>
> ... The declared homestead provisions and the automatic exemption law each confer different rights on the homesteader, and there is no overlap between these rights. One may have rights under the declared homestead law, or rights under the automatic exemption law, or both, or neither. Id., 235 Cal.App.3d at 651.
>
> ... The fact that one set of statutes refers to the other in some manner does not blur the distinctions between the rights each confers on the homesteader. Id., 235 Cal.App.3d at 651.
>
> ... We remain aware that the fundamental policy behind the homestead exemptions is to protect insolvent debtors and their families from going homeless." ... Id., 235 Cal.App.3d at 652.

As evidenced in the Webb case, the court was clear that the declared homestead can, in fact, protect one's home from a forced sale. However, according to Business and Professions Code, § 17537.6, an attorney must misinform individuals who have yet to retain the

attorney's services that a declared homestead will not prevent a forced sale of their home.

That portion of Business and Professions Code, § 17537.6, which excludes attorneys, is confusing, misleading and suppresses the giving of accurate, free legal advice. Legislative intent research has revealed that the statute originally intended to exclude attorneys, but that the language, "for a client who has retained that attorney," was added to, in fact, regulate attorneys. This is not the way the statute was read by many. Matthew Bender Legal Forms Transactions Guide, Vol. 6, pp. 27-16 states in pertinent part as follows:

> "A homestead filing service is a service performed or offered to be performed for a compensation in connection with the preparation or completion of the homestead declaration ... Services performed by attorneys are specifically excluded from this definition. [Bus. & Prof. Code, § 17537.6(e)(1)]."

Also, the Honorable Judge Witkin who is

regarded by the courts as an authority on the law states in his publication entitled Witkin's California Procedure (3d. Ed.), Vol. 8, Enforcement of Judgment, § 223, as follows:

> "(New) Homestead filing services: Non-lawyers preparing or assisting in the preparation of homestead declarations for compensation are now subject to statutory regulations: Untrue or misleading statements are prohibited, a disclosure statement is required, time limits for recordation are imposed and fees are restricted. [See Bus. & Prof. Code, § 17537.6, added in 1987]." [Emphasis added].

The constitutional command of free speech and assembly requires that laws and regulations governing them be drawn so as to give citizens fair warning as to what is illegal, that regulations involving speech and assembly not be so broad in scope as to stifle First Amendment freedoms, that appropriate limitations be placed on the discretion of public officials where speech and assembly are intertwined with regulated conduct, and that all such laws and regulations be applied with

an equal hand. Cox v. Louisiana 379 U.S. 559, 85 S. Ct. 476. Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, the United States Supreme Court looks even more closely, lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. Such a law must be narrowly drawn to prevent the supposed evil. Ashton v. Kentucky 384 U.S. 195, 86 S. Ct. 1407.

C. THE UNDERSTANDING OF THE LAWS OF CALIFORNIA SHOULD NOT BE AVAILABLE ONLY TO THE RICH

Petitioner provided the Court of Appeals with substantial and significant evidence challenging the constitutionality of Business and Professions Code, § 17537.6 on vagueness grounds. Petitioner presented evidence that not only attorneys and a District Attorney in San Diego, but also, the Honorable Judge Witkin and Matthew Bender interpret the statute as not applying to attorneys.

The court did not find the statute clear and unambiguous. The Court of Appeals stated that even if they agreed with Petitioner that the language of the statute is uncertain, in light of legislative purpose, they rejected the vagueness claim. The court cited the case of Walker v. Superior Court, (1988) 47 Cal.3rd 112, 143, wherein it cites the language of People v. Grubb, (1965) 63 Cal.2d 614, 620, 47 Cal.Rptr. 772, 408 P.2d 100, as follows:

> "We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purpose."

The Grubb case involved a criminal defendant who was charged with possession of a "billy." The defendant in Grubb argued that the term "billy" encompasses such ordinary objects as an orthodox baseball bat, a table leg, or a piece of lumber. The court found that the terms of the statute gained content and definition by reference to its purpose.

In the case before the court today, the Court of Appeals created a whole new meaning to the phrase "apprise oneself as to legislative history and purpose." In understanding Business and Professions Code, § 17537.6, the Court of Appeals solely relied upon documents from the Senate Committee on Judiciary wherein it explains the ambiguities which have confused even legal scholars. What the court has neglected to concede is how one goes about obtaining a copy of these documents. These documents are only contained in the Governor's Chapter Bill File and Senate File located in the Archives Building for the State of California, in the City of Sacramento.

A fair reading of the Grubb case evidences that the court requires citizens to be aware of legislative history and purpose as derived from the statute, not from documents located in the Archives Building in Sacramento. In People v. Belous, (1969) 71 Cal.2d 954, 960,

80 Cal.Rptr. 354, 458 P.2d 194, the court held that,

> "The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in question."

The Court of Appeals has gone much further and interpreted the Grubb case to require citizens to travel to Sacramento in order to research legislative intent documents or to pay hundreds of dollars to others to do so. Petitioner's counsel paid $600.00 to the Legislative Intent Service to obtain a copy of the documents which were provided to the Court of Appeals, and upon which the Court of Appeals drew its conclusion as to its understanding of the statute. What types of burdens are citizens to endure in order to understand the laws of our State? Clearly, the Court of Appeals requires the traveling to Sacramento or the expenditure of hundreds of dollars in order to obtain legislative intent

documents. Was this the intent of the Grubb case upon which the Court of Appeals relied? Such an interpretation violates the of due process guarantees under the United States and California Constitution.

CONCLUSION

The Court of Appeals has interpreted the Grubb case, supra, to impose a new duty upon citizens who are attempting to interpret California laws. Citizens are now required to search the archives in Sacramento or pay others hundreds of dollars to do so in order to understand our laws. Clearly, this was not the intent in Grubb and other cases on point.

Business and Professions Code, § 17537.6 is factually incorrect and mandates the giving of false legal advice. Not only does this violate Petitioner's due process guarantees, but infringes upon Petitioner's First Amendment rights by prohibiting him from disseminating accurate and correct legal advice.

The civil penalties imposed against the Petitioner are excessive and arbitrary. The restitution has no basis in fact. Petitioner has been completely denied his opportunity to present evidence on his behalf and the arbitrary amounts violate any notion of due process.

The decision rendered by the trial court has financially destroyed Petitioner and his family. Even if this court finds this statute to be constitutional, how is justice served by imposing $800,000.00 in penalties and restitution against one man whose total assets are far less than the penalty imposed?

This is not a case to be passed over. The Court of Appeals has created new and inconsistent rulings which are devastating to the public.

Based upon the foregoing, it is respectfully requested that Petitioner's request for review be granted.

Respectfully submitted,

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June 13, 1994

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

IVAN O.B. MORSE,

Defendant and Appellant.

THE PEOPLE,

Plaintiff and Respondent,

v.

IVAN O.B. MORSE,

Defendant and Appellant.

In these consolidated appeals, Ivan O.B. Morse challenges the trial court's issuance of a preliminary injunction that enjoined him from mailing to the public solicitations concerning homestead declarations without complying with Business and Professions Code section 17537.6,[1] and a subsequent judgment

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[1]All further statutory references are to the Business and Professions Code unless otherwise indicated.

that granted a permanent injunction, imposed $400,000 in civil penalties for Morse's violation of section 17537.6, and ordered that Morse pay $400,000 in cy pres restitution. He raises both constitutional and nonconstitutional challenges to the court's actions. Because the issuance of the judgment moots the appeal from the order granting a preliminary injunction, we dismiss that appeal. We also affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At least since January 1988, Morse, a licensed attorney, has mailed solicitations to homeowners offering assistance in the filing of homestead declarations. Between January 1988 and January 1992, he mailed approximately 4 million of these solicitations to California homeowners who had recently recorded trust deeds on their homes. As a result of these mailings, Morse prepared over 88,000 homestead declarations and received over $1.8 million in fees.

On August 8, 1991, after unsuccessfully requesting that Morse stop mailing solicitations, respondent People of the State of California filed a "COMPLAINT FOR INJUNCTION, CIVIL PENALTIES, RESTITUTION AND OTHER RELIEF" against Morse, both individually and doing business as Morse and Associates. The complaint's first cause of action alleged that Morse had violated section 17537.6, which regulates solicitations in connection with the operation of a homestead filing service. Among other things, the complaint alleged that Morse's solicitations contained untrue and misleading statements insofar as they (1) suggested that recordation of a homestead declaration would in some manner prevent the forced sale of a judgment debtor's dwelling, (2) suggested that the advantages of the homestead exemption statutes are available only to those who record a homestead declaration, (3) suggested that Morse had a file or record pertaining to the person

receiving the solicitation, and (4) failed to make the statutorily required disclosures.[2] The complaint requested that the court permanently enjoin Morse from violating section 17537.6, and requested imposition of civil penalties and restitution.

In a motion for a preliminary injunction filed July 31, 1992, respondent requested that the court enjoin Morse from violating section 17537.6 in connection with his mailing of solicitations to the public. In opposing the motion, Morse attacked the constitutionality of section 17537.6 on a variety of grounds. The court rejected Morse's constitutional arguments and granted the motion. It issued a preliminary injunction enjoining Morse from performing or failing to perform certain acts in accordance with section 17537.6. On August

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[2]The complaint also alleged that Morse had made false and misleading statements to the public in violation of section 17500, and had engaged in unlawful or unfair business practices within the meaning of section 17200.

20, 1992, Morse filed a notice of appeal from the preliminary injunction order.

On October 8, 1992, respondent moved for summary judgment or, in the alternative, summary adjudication. In opposition to the motion, Morse conceded that his solicitations failed to comply with a number of the requirements of section 17537.6, but again attacked the constitutionality of the statute and argued that respondent had failed to present any evidence that his statements were misleading.[3] In light of this concession, the court granted summary adjudication on respondent's claim for violation of section 17537.6.[4] It entered a judgment permanently

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[3]Morse takes the same position on appeal, stating: "The written materials [I] mailed ... to the public did not comply with the disclosure and other requirements contained in [section] 17537.6, but the content of the materials was nondeceptive, accurate and truthful in every detail."

[4]The court denied respondent's request for summary judgment as to the causes of action for making false and misleading

enjoining Morse from violating the statute in connection with sending written solicitations to the public. The judgment also orders Morse to pay $400,000 in civil penalties under section 17536, and $400,000 in cy pres restitution. Morse then filed an appeal from this judgment. We consolidated the appeal with his appeal from the preliminary injunction.

DISCUSSION

Initially, we dismiss the appeal from the order granting the preliminary injunction. The subsequent judgment, which included a permanent injunction, moots that appeal. Therefore, we will not address the propriety of granting the preliminary injunction. (People v. Rath Packing Co. (1978) 85 Cal.App.3d 308, 314.) We thus turn to the appeal from the final judgment.

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statements to the public and engaging in unlawful or unfair business practices.

I. Constitutionality of Section 17537.6

A. First Amendment

Morse's primary argument on appeal is that section 17537.6, which he admittedly violated, is an unconstitutional restraint of "his rights to free commercial speech under the First Amendment ..." He states that "[t]here is no question here but that ... [section] 17537.6 regulates commercial speech, since it both mandates and prohibits certain speech." He further argues that, because the written solicitation materials that he distributed were nondeceptive, accurate, and truthful, they constituted protected commercial speech that section 17537.6 unconstitutionally regulates.

The first step in a commercial speech case is to "determine whether the expression is protected by the First Amendment." (Central Hudson Gas & Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557, 566.) "The First Amendment's concern for commercial speech is

based on the informational function of advertising. [Citation.] Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." (Id., at p. 563.) "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading [citation] ...." (Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 638; see also Central Hudson, supra, at p. 563 ["government may ban forms of communication more likely to deceive the public than to inform it"].) Thus, for commercial speech to receive First Amendment protection, "it at least must concern lawful activity and not be misleading." (Central Hudson, supra, at p. 566.) Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law which we must determine after independently

reviewing the record.[5] (Peel v. Attorney Disciplinary Comm'n of Ill. (1990) 496 U.S. 91, 108 (plur. opn. of Stevens, J.); Ohralik v. Ohio State Bar Assn. (1978) 436 U.S. 447, 463-464.)

Having reviewed the record, we agree with

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[5]Thus, Morse is incorrect in stating that, "[s]ince the Trial Court decision related solely to technical violations of ... [section] 17537.6 ... and the Court did not find that any portion of the materials sent out by [him] to the public was deceptive or false, this issue is not before this Court. Additionally, Morse's statement mischaracterizes the record. At the summary judgment hearing, as to one of Morse's representations, the trial court stated: "I'm not sure it's untrue, but it certainly is somewhat misleading." However, because Morse conceded that his materials did not comply with section 17537.6, but did not concede that they were false and misleading, the trial court granted summary judgment only for noncompliance with the statute. It explained: "Okay. I'll tell you what I'll do because I don't think it makes any difference for purposes of your appeal. I am going to grant summary adjudication of the first cause of action in favor of the State and the County. That is the violation of Section 17537.6. Just to keep this clean I will deny the summary adjudication as to the second and third causes of action."

respondent that Morse's advertisements are deceptive and misleading in a number of ways, and therefore are not entitled to First Amendment protection. Initially, Morse's complete failure to explain that, under Code of Civil Procedure sections 704.710-704.850, homeowners automatically receive a homestead exemption even if they do not record a homestead declaration renders his solicitation materials misleading. The materials variously refer to "a Homestead," "THE HOMESTEAD EXEMPTION," a "DECLARED HOMESTEAD," and a "Declaration of Homestead," and purport to discuss the benefits of "record[ing] a Homestead" and "recording a Declaration of Homestead." However, the materials never explain that, under California law, there is a difference between "the Homestead Exemption," which refers to the automatic exemption under Code of Civil Procedure

sections 704.710-704.850,[6] and a "Declared Homestead,"[7] or that the benefits of the homestead exemption are available even to those who do not record a homestead declaration. Rather, the materials use these terms essentially interchangeably.[8] By using the terms interchangeably without identifying the automatic homestead exemption or

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[6]The article that contains these sections is entitled, **"HOMESTEAD EXEMPTION."**

[7]The article that relates to homestead declarations (Code Civ. Proc., §§ 704.910-704.995) is entitled, **"DECLARED HOMESTEADS."**

[8]Examples of how Morse uses the terms interchangeably without explaining the differences are the following paragraphs: **"WILL MY HOMESTEAD DECLARATION PREVENT ME FROM REFINANCING MY PROPERTY?** - No. Homestead Exemption does not apply to mortgages or deeds of trust placed on the property. You'll be free to refinance the property or obtain second and third deeds of trust." **"ARE THERE DISADVANTAGES TO RECORDING A DECLARATION OF HOMESTEAD?** - No. Homestead is a valuable right given to you by law. By recording a Declaration of Homestead, you are exercising your right to protect your home to the maximum extent allowed by law."

discussing its benefits, the materials incorrectly suggest that the homestead exemption and a declared homestead are the same thing and that an exemption applies only if there is a recorded homestead.[9] They

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[9]The following paragraph from Morse's materials provides a clear example of this confusion: "**WHO IS ELIGIBLE FOR THE HOMESTEAD EXEMPTION**? - Every homeowner who resides in his/her home is entitled to this protection. The basic requirement is that the dwelling be your principal place of residence." It is unclear whether this paragraph refers only to a declared homestead or, because it speaks generally of "**THE HOMESTEAD EXEMPTION**," it also refers to the automatic exemption. However, because the materials refer interchangeably to "**THE HOMESTEAD EXEMPTION**" and "a Declaration of Homestead," and never explain that there is an automatic exemption, they create the impression that a homeowner can obtain a "Homestead Exemption" only by recording a "Declaration of Homestead." The paragraph furthers this misimpression by using the word "**ELIGIBLE**," which suggests that, although all homeowners may meet the requirements for obtaining a homestead exemption, they receive one only if they record a homestead declaration. (See Samuels v. Hite (1950) 35 Cal.2d 115, 116 ["the word 'eligible' means 'capable of being chosen -- the subject of selection or choice'"]; Black's Law Dict. (6th ed. 1990) p. 521, col. 1 [defining "[e]ligible" as "[f]it and proper to be chosen" or "[c]apable of being chosen"].)

therefore are deceptive and misleading.[10]

Morse's materials are also misleading in their discussion of a homeowner's protection against the forced sale of the home. The very first paragraph of the "**HOMESTEAD INFORMATION SHEET**" (**INFORMATION SHEET**) that Morse distributed states: "**WHAT IS THE PURPOSE OF HOMESTEAD EXEMPTION?** The policy underlying all homestead laws is to provide a place for the family where they [sic] may reside and enjoy the comforts of a home, free from the anxiety that it may be taken away from them [sic]." This statement of purpose suggests that the recording of a homestead declaration

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[10]Morse maintains that section 17537.6 "does not mandate that anyone ... has an affirmative obligation to mention the automatic homestead exemption in its solicitations." However, the statute does prohibit anyone from representing that any of the benefits relating to the automatic exemption "are available only to persons who prepare or record a homestead declaration." (§ 17537.6, subd. (a)(3).)

necessarily prevents the forced sale of a family's home; otherwise, the family could not be "free from the anxiety that it may be taken away ...." However, even where a homeowner records a homestead declaration, a creditor may force the sale of a home through a levy pursuant to a writ of execution. (See Code Civ. Proc., §§ 704.740-704.800, 704.970.)[11] Morse's statement is misleading

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[11]Under Code of Civil Procedure section 704.970, subdivision (a), a creditor has the same right of levy pursuant to a writ of execution "[w]hether or not a homestead declaration has been recorded[.]" Subdivision (b) of that section directs that [a]ny levy pursuant to a writ of execution ... and the sale pursuant thereto shall be made in compliance with" the statutes governing the automatic homestead exemption (Code Civ. Proc., §§ 704.710-704.850), "and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by" those statutes. Under Code of Civil Procedure section 704.800, subdivisions (a) and (b), even if the automatic homestead exemption applies, a creditor may force the sale of a homestead if, at a court-ordered sale, there is a bid that (1) "exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien" and (2) "is 90 percent or more of the

in suggesting otherwise.[12]

Nothing that follows in the Information Sheet, or anything else in the materials, explains that, under certain circumstances, a creditor can force the sale of the home even if the homestead exemption applies and there is a recorded homestead declaration.[13] In fact, Morse's materials are otherwise silent as to the issue of a forced sale, except for the following paragraph: "3. If a creditor

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fair market value ...."

[12]Morse asserts that the statement "cannot be misleading" because the wording of the statement "was derived from the Supreme Court of California and the California Court of Appeal ...." However, regardless of the source of the language, the statement is deceptive absent an explanation that, even with a recorded homestead declaration, a creditor may be able to force a sale.

[13]Although Morse's materials indicate that a declared homestead protects a homeowner's equity from lien attachment up to certain amounts, they do not explain that a creditor may, under certain circumstances, force the sale of the home despite the existence of the protection.

tries to force a sale of your home, with a Declaration of Homestead you'll have an important advantage over him in court. The creditor has the burden of proof to show why you should not be allowed the Homestead Exemption. Otherwise, the court will take your Declaration at its face value and grant you the exemption." Rather than clarifying the misimpression that the opening paragraph of the Information Sheet creates, this paragraph is further deceptive in suggesting that, so long as the court grants a homestead exemption, a creditor cannot force the sale of a home. However, as we have previously explained, a creditor may force a sale even if the homestead exemption applies. (See Code Civ. Proc., §§ 704.740-704.800, 704.970.)

This paragraph is further misleading regarding the burden of proof. The paragraph suggests that, absent a recorded homestead declaration, the homeowner bears the burden of proving the applicability of the exemption.

Indeed, in his brief on appeal, Morse explicitly states that, "[w]ith an automatic exemption, the homeowner carries the burden of proof of entitlement." He is incorrect. Under Code of Civil Procedure section 704.780, subdivision (a)(1), even without a recorded homestead declaration, the creditor has the burden of proof "[i]f the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor ...."[14] This section

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[14]Code of Civil Procedure section 704.780's reference to a "homeowner's exemption" is not a reference to a recorded homestead declaration under Code of Civil Procedure section 704.930. Rather, the "homeowner's exemption" to which Code of Civil Procedure section 704.780 refers is the exemption under sections 218 and 253.5 of the Revenue and Taxation Code. (See Recommendation Relating to the Enforcement of Judgments Law (Sept. 1982) 16 Cal. Law Revision Com. Rep. (1982) p. 1095, fn. 301 and accompanying text.) This distinction is evident from the fact that homestead declarations are filed "in the office of the county recorder of the county where the dwelling is located" (Code Civ. Proc., § 704.920), not with "the county tax assessor ...." (Code Civ. Proc., §

"creates a presumption in favor of exempt status if the judgment debtor has claimed a homeowner's or veteran's property tax exemption for the dwelling." (Recommendation Relating to the Enforcement of Judgments Law (Sept. 1982) 16 Cal. Law Revision Com. Rep., supra, at p. 1095.) Moreover, it places an affirmative burden on the creditor, in applying for an order of sale, to indicate "whether or not the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claimed any such exemption." (Code Civ. Proc., § 704.760, subd. (a).) Thus, Morse's materials are deceptive in suggesting that, in order not to have the burden of proving the applicability of the homestead exemption, a homeowner must record a homestead declaration.

704.780, subd. (a)(1).)

Given our conclusion that Morse's materials are deceptive and misleading, they are not entitled to commercial speech protection under the First Amendment.[15] Moreover, given the nature of his action, Morse is incorrect in arguing that he may challenge the constitutionality of section 17537.6 even if his own conduct is unprotected. "In the First Amendment contest, [we have] permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected. [Citations.]" (Bates v. State Bar of Arizona (1977) 433 U.S. 350, 380.) However, the justification for this "departure from the traditional rule that a person may

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[15]Our discussion of the ways in which Morse's materials are deceptive and misleading is not exhaustive. Our review of the record discloses other ways in which the materials are deceptive and misleading. For purposes of deciding this appeal, it is not necessary to discuss all of the deceptions.

not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court [citations] ... applies weakly, if at all, in the ordinary commercial context." (Ibid.) Accordingly, the overbreadth doctrine does not apply "to professional advertising, a contest where it is not necessary to further its intended objective. [Citation.]" (Id., at p. 381; see also Shapero v. Kentucky Bar Assn. (1988) 486 U.S. 466, 478; Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 497 ["overbreadth doctrine does not apply to commercial speech"]; Ohralik v. Ohio State Bar Assn., supra, 436 U.S. at p. 462, fn. 20.) We therefore decline to address whether section 17537.6 as it applies to the conduct of others is constitutional under the First Amendment.

B. Vagueness

Morse also contends that section 17537.6 is unconstitutionally vague as it applies to lawyers. Subdivision (e)(1) of that section,

which defines a "'Homestead filing service,'" excludes "any service performed by an attorney at law authorized to practice in this state for a client who has retained that attorney or an employee of that attorney acting under the attorney's direction and supervision." Morse complains: "The statute does not define the word 'retained,' nor is the definition contained as part of the legislative history. The statute does not tell the reader whether the client has to be an existing client, one who had 'retained' the attorney for other matters before discussing Declarations of Homestead, or whether the 'retained' exemption merely applies to an attorney being hired to prepare a Declaration of Homestead." Morse concludes that, "[s]ince ordinary people of common intelligence could guess as to the meaning of portions of the statute, ... applying this statute to [him] would violate [his] due process rights ..."

The guarantee of due process of law

includes the requirement of a reasonable degree of certainty in legislation. (People v. Superior Court (Caswell)" (1988) 46 Cal.3d 381, 389.) To withstand a vagueness challenge, "a statute must be sufficiently definite to provide adequate notice of the conduct proscribed. '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [Citations.]' [Citations.]"[16] (Ibid.) In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, we consider not

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[16]A statute must also "provide standards for its application and adjudication in order to avoid the dangers of arbitrary and discriminatory enforcement. [Citation.]" (Williams v. Garcetti (1993) 5 Cal.4th 561, 575.) Morse does not attack section 17537.6 on this ground, and we therefore do not address it.

only the language of the challenged statute, but also its legislative history. (Walker v. Superior Court (1988) 47 Cal.3d 112, 143.) "We thus require citizens to apprise themselves not only of statutory language but also of legislative history ... and underlying legislative purposes [citation]. [Citation.]" (Ibid.)

Here, even if we agreed with Morse that the language of section 17537.6 is uncertain, in light of its legislative history, we must reject his vagueness claim.[17] Prior to its final passage, the bill that became section 17537.6 provided in relevant part:

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[17]We grant Morse's request that we take judicial notice of the legislative history of section 17537.6. We deny his request that we take judicial notice of a voluntary bankruptcy petition that he filed after the trial court entered judgment. (See In re Issac J. (1992) 4 Cal.App.4th 525, 535 [refusing to reevaluate trial court decision in light of postjudgment events]; In re Daniel C. H. (1990) 220 Cal.App.3d 814, 830 [appellate court normally will not consider matters occurring after judgment].)

"'Homestead filing service' does not include any service performed by an attorney at law authorized to practice in this state ...." (Assem. Amend. to Assem. Bill No. 684 (1987-1988 Reg. Sess.) May 4, 1987.) The Senate amended this provision of the bill to its final form by adding the phrase, "for a client who has retained that attorney ...." (Sen. Amend. to Assem. Bill No. 684 (1987-1988 Reg. Sess.) Aug. 17, 1987.) According to the legislative history, the purpose of this amendment was to "narrow the exemption for homestead filing services provided by attorneys or their employees to services provided to a client of the attorney's. Otherwise, the bill would have permitted attorneys or their agents to engage in the reprehensible mail order practices barred by this bill." Thus, it is clear that the exclusion applies only to services an attorney provides to preexisting clients, and that the Legislature intended to prohibit

attorneys from doing precisely what Morse did in this case. We therefore reject Morse's vagueness challenge.[18]

C. Due Process

Morse also contends that section 17537.6, subdivision (b)(1), violates his due process rights under Tot v. United States (1943) 319 U.S. 463. We disagree.

We reject Morse's claim because we find Tot completely inapplicable to this case. Tot addresses the constitutionality of a statute that creates an evidentiary presumption, i.e., a statute that "make[s] the proof of one fact

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[18]Moreover, we note that Morse's solicitation materials belie his claim that he did not know he was operating a homestead filing service. In the cover letters he sent with his materials between April and December 1988, Morse stated: "TO ASSURE PROMPT PROCESSING, SEND IN YOUR HOMESTEAD SERVICE APPLICATION WITHIN 15 DAYS!!" (Emphasis added.) Thus, notwithstanding his argument on appeal, Morse himself thought he was operating a homestead filing service. Morse changed the language of his cover letters by deleting the reference to a "HOMESTEAD SERVICE APPLICATION" only after receiving a letter informing him that he was violating section 17537.6.

or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.[19] (Tot v. United States, supra, 319 U.S. at p. 467.) Section 17537.6 does not create an evidentiary presumption. Therefore, the analysis in Tot is inapplicable.[20]

II. Award of Penalties and Restitution

In addition to challenging the constitutionality of section 17537.6, Morse attacks the trial court's assessment of civil penalties on a variety of grounds. He first argues that the award was improper because the court made the award "without first receiving and considering evidence of [his] financial

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[19]The statute at issue in Tot provided that possession of a firearm or ammunition by certain persons "'... shall be presumptive evidence that such firearm or ammunition was shipped or transported or received ... in violation of this Act.'" (Tot v. United States, supra, 319 U.S. at p. 464.)

[20]In the trial court, Morse candidly acknowledged that Tot "is not directly on point .... "

condition, wealth and profits. [Citations]."

Without agreeing with Morse's assertion that such evidence is always necessary in determining the amount of an award of civil penalties,[21] we find sufficient financial

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[21]In support of his argument, Morse cites section 17536, subdivision (b). However, that section directs the court to consider "the defendant's assets, liabilities, and net worth" only if these circumstances are "presented by any of the parties to the case ...." (§ 17536, subd. (b).) At the summary judgment hearing, Morse's counsel stated that Morse was "entitled to a hearing on the damages or a hearing to determine factually how much he's made" from his homestead declaration business. There is a difference between the amount Morse made through his solicitations and his "assets, liabilities, and net worth." Thus, his invocation of an alleged right to a hearing regarding "how much he's made" was not a request generally for a hearing regarding his wealth and financial condition. Nor does it meet the statutory requirement that relevant circumstances be "presented by ... the parties to the case" (§ 17536, subd. (b)), especially given Morse's position that respondent bore the burden of proof and his refusal to respond to the court's questions regarding his profits. Finally, Morse's citation to cases involving punitive damages does not establish that such proof is required in assessing statutory penalties. (See Beeman v. Burling (1990) 216 Cal.App.3d 1586, 1601 ["there is no authority for the proposition that statutory damages ... must be supported by evidence of the

information in the record to support the award. Respondent submitted evidence showing that, between January 1988 and April 1992, Morse received over $1.8 million in fees from those for whom he prepared homestead declarations. This evidence was sufficient to support the court's award of $400,000 in civil penalties, notwithstanding the absence of evidence of Morse's net profit or other evidence of his financial condition.[22] (See Kinney v. Vaccari (1980) 27 Cal.3d 348, 356, fn. 6 [upholding penalty given evidence of "monthly rental receipts"]; People ex rel. Van

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defendant's wealth"].)

[22]Given our conclusion, we need not address Morse's argument that respondent bore "[t]he burden of proof concerning financial condition, wealth and profits ...." We note, however, that in State of California v. City and County of San Francisco (1979) 94 Cal.App.3d 522, 530-531, we held that, once the evidence establishes a statutory violation under Water Code section 13385, it becomes the defendant's burden to establish that the court should impose a penalty less than the statutory maximum.

de Kamp v. Cappuccio, Inc. (1988) 204 Cal.App.3d 750, 765 [affirming civil penalty of $73,528.05 in light of evidence that defendant had "gross income" in 1979 of over $1.5 million]; see also Walker v. Signal Companies, Inc. (1978) 84 Cal.App.3d 982, 998 [affirming punitive damage award that was "less than 1 percent of gross assets at book value of each defendant"].)

We next reject Morse's assertion that the court erred in basing the damage award "on the number of solicitations mailed, rather than the number of people who receive and read the solicitations, or who responded to the solicitations. [Citations.]" In People v. Superior Court (Jayhill Corp.) (1973) 9 Cal.3d 283, 289, which involved charges of false and misleading advertising in connection with door-to-door solicitation, the Supreme Court held that the number of violations under section 17536 "is to be determined by the number of persons to whom the

misrepresentations were made," and that a court may impose up to a $2,500 penalty "for each customer solicited by a defendant." Applying this test, we find that each person to whom Morse sent a solicitation constitutes a "customer solicited by" Morse and a person "to whom the misrepresentations were made ...."[23] (Jayhill Corp., supra, at p. 289.) Thus, the trial court did not err.

In arguing to the contrary, Morse incorrectly relies on People v. Superior Court (Olson) (1979) 96 Cal.App.3d 181. In Olson, defendant disseminated false and misleading newspaper advertisements in violation of section 17500. (Olson, supra, at pp. 184-185.) On appeal, the court held that, for purposes of assessing penalties under section 17536, "a single publication

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[23]Under Evidence Code section 641, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

constitutes a minimum of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service." (Olson, supra, at p. 198.) In reaching this conclusion, the court rejected the argument that "the circulation of the newspaper should be the measure of the number of violations." (Id., at p. 196.) The court reasoned that this measure could result in a penalty in excess of $2.5 billion for each edition of the newspaper (id., at p. 197), that "it is 'unreasonable' to assume that the Legislature contemplated penalties of that magnitude for a false advertisement in a single edition of a newspaper," and that "[t]o so interpret the statute would render it violative of the due process prohibition against 'oppressive' or 'unreasonable' statutory penalties.

[Citation.]" (Id., at p. 198.)

Olson is inapplicable to the facts of this case. In contrast to the mass appeal at issue with the newspaper advertising in Olson,[24] Morse conducted a direct mail campaign involving highly individualized solicitations. The address window on Morse's solicitations displayed not only the name and address of the homeowner-recipient, but also the name of the homeowner's lender. Moreover, Morse included in the solicitation materials the mortgage balance of the homeowner. Morse obtained this information, and determined the recipients of his solicitations, from public records that identified those "California residents who ha[d] recently recorded a trust deed." Thus, Morse selected recipients and designed his materials to ensure that his solicitations

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[24]The court in Olson twice emphasized that it was interpreting section 17536 "in the context of a newspaper advertisement ...." (People v. Superior Court (Olson), supra, 96 Cal.App.3d at p. 198.)

would be noticed and read.[25] Under these circumstances, it is reasonable to assume that the Legislature contemplated a penalty for each direct mailing. This interpretation does not violate the due process prohibition against oppressive or unreasonable statutory penalties.[26]

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[25]The nature and presentation of the information Morse included in his solicitations, and his method for selecting recipients, rebuts his characterization of his mailings as "'junk mail'" that many people do not read. Nor does the record support his claim that the envelopes of his solicitations "clearly indicated that the contents were 'advertisement.'" The record contains five sample cover letters that Morse sent with his solicitations. Only two of them indicate that they are a "PRIORITY ADVERTISEMENT." Even as to these two, the record does not establish that this information was visible from the outside of the envelope.

[26]The two additional cases Morse cites in his reply brief do not suggest a different conclusion. In both, courts looked to evidence of completed transactions to establish a minimum number of violations sufficient to affirm penalty awards. (People v. Toomey (1984) 157 Cal.App.3d 1, 22 [evidence of sales sufficient to support finding of "at least 150,000 violations"];

We also reject Morse's contention that the penalty award is unconstitutionally excessive. In his appellate brief, Morse asserts that the penalties the trial court imposed "approximate 190% of [his] total net worth, well over 150% of the total profit [he] realized ... between 1988-1992 from the homestead declaration venture, and 800% of the profit [he] generated ... from the non-homestead activities of his law practice for the entire year of 1992." However, because there is no evidence in the record to support these assertions, we must disregard them. (Tisher v. California Horse

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People v. Bestline Products, Inc. (1976) 61 Cal.App.3d 879, 923 [evidence that 3,000 people acted in response to solicitations supports finding "of at least 3,000 violations"].) Neither suggests that there were not additional violations in connection with solicitations that did not result in completed transactions. (See Bestline Products, supra, at p. 923 [evidence supports imposition of penalties "based upon false and misleading representations having been made to upward of 10,000 prospective distributors, 3,000 of whom in fact acted thereon to become direct or general distributors"].)

Racing Bd. (1991) 231 Cal.App.3d 349, 361.) Indeed, Morse did not contend below that the penalty was disproportionate to his wealth or ability to pay, even when the court indicated the amount of the penalty it intended to impose and asked him to comment.[27] Having failed to make this argument below, and having failed to include in the record evidence to support it, Morse cannot now challenge the penalties as excessive.[28] (See Kinney v. Vaccari, supra, 27 Cal.3d at p. 356, fn. 6

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[27]The court asked Morse, "Do you feel 20 cents a violation is excessive?" Morse's counsel replied: "I think it would be inappropriate for me to state my opinion because I don't believe that's my call."

[28]Moreover, "[w]hen compared with the maximum possible fine of $2,500 per violation, the trial court's assessment [of 20 cents per violation] was reasonable, if not lenient." (People v. Toomey, supra, 157 Cal.App.3d at p. 23; see also People ex rel. Van de Kamp v. Cappuccio, Inc., supra, 204 Cal.App.3d at p. 765 [court's award of $124.20 per violation was "well within its discretion" under statute authorizing award of $2,500 per violation].)

[rejecting claim that penalty was confiscatory because it exceeded property's value given failure "to introduce any evidence of that value at trial"]; People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal.App.3d 683, 692 [upholding penalty "[i]n view of the fact that [defendants] have not claimed the award was disproportionate to their wealth or ability to pay"].)

Finally, we reject Morse's attack on the restitution award. Morse asserts generally that the court's order "has no basis in fact or law, is oppressive and arbitrary, and denies [him] his due process rights ...." However, he cites no authority to support these assertions. "Where a point is merely asserted ... without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.

[Citation.][29] (Atchley v. City of Fresno (1984) 151 Cal.App.3d 635, 647.)

DISPOSITION

The appeal from the order granting the preliminary injunction is dismissed as moot. The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

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[29]In his reply brief, Morse contends that the restitution award is improper because those who responded to his solicitations received exactly what they believed they were receiving and for the price they believed they were to pay. However, given Morse's failure to raise this argument in his opening brief, we need not address it. (Tisher v. California Horse Racing Bd., supra, 231 Cal.App.3d at p. 361.)

Chin, J.

We concur:

Merrill, Acting P.J.

Werdegar, J.

People v. Morse, A058935, A060033

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE MARK L. EATON, JUDGE

DEPARTMENT 50

PEOPLE OF THE STATE OF CALIFORNIA)
)
Plaintiff,)
)
vs.)
)
IVAN O.B. MORSE,)
)
Defendant.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, NOVEMBER 9, 1992

APPEARANCES

For the Plaintiff, STATE OF CALIFORNIA: LAURA W. KAPLAN, Deputy Attorney General

For the Plaintiff, JOHN H. MEEHAN: LAWRENCE C. BLAZER, Deputy District Attorney

For the Defendant: RALPH D. HUGHES, Attorney at Law

DENISE GRAHAM, CSR# 7897

THE COURT: All right. People versus Morse or State versus Morse.

MR. BLAZER: Good morning, Your Honor, Larry Blazer of the District Attorney's office on behalf of Plaintiff.

MS. KAPLAN: Laura Kaplan on behalf of the Attorney General's office for the Plaintiff.

MR. HUGHES: Good afternoon, Ralph Hughes appearing on behalf of Mr. Morse.

THE COURT: The tentative ruling is to grant, so I take it you want to say something?

MR. HUGHES: Yes, I certainly do, Your Honor.

THE COURT: Go ahead.

MR. HUGHES: May I be seated?

THE COURT: Sure.

MR. HUGHES: First off on a couple procedural matters, there is a discovery order which is outstanding which is subject to motion. I assume that's been vacated as well as the trial date's been vacated; is that

correct?

THE COURT: Obviously.

MR. HUGHES: Okay. The objection that we have to the tentative ruling, Your Honor, is actually several-fold. The primary reason for our appearance is that the -- I think the Court would agree that the burden of proof on a motion for summary judgment clearly rests with the moving party. In this case it would be the People.

THE COURT: I'm not sure that's true. There is no burden of proof. Summary judgment is beyond a burden of proof. Summary judgment is granted only if there are no facts whatsoever or even inferences whatsoever on their side so it's not a question of burden of proof. You can raise almost any inference or any fact to offset the motion and you prevail.

MR. HUGHES: I would cite the case of Thompson versus Keckler, K-e-c-k-l-e-r.

THE COURT: You cited that in your briefs?

MR. HUGHES: No, sir, I did not.

THE COURT: It's a little late now. I'm not going to sit down and pull out some books and start reading this moment.

MR. HUGHES: I think the fact, Your Honor, is that the moving papers and the entire argument of the People has been that the representation made by Mr. Morse in the solicitations are inaccurate and that they are false and misleading.

THE COURT: That's on the second -- that's on two of the causes of action. The first cause of action is that his activity falls within Section 17537.6 of the Business and Professions Code.

MR. HUGHES: If I understand --

THE COURT: And therefore is violative of law.

MR. HUGHES: If I understand the Court's -- the summary judgment was --

THE COURT: What difference does it make? What if I just grant summary adjudication as to the first cause of action; does it make any

difference?

MR. HUGHES: I think Mr. Morse is entitled to know what it is this Court is finding him liable for.

THE COURT: Okay.

MR. HUGHES: And the fact is that in terms -- it's also relevant on another area in which I'll get into in a second. But the fact is that the State -- the People have never established any evidence, any proof whatsoever legally or factually that so much as a single word of any document ever sent out by Mr. Morse is false and these are questions of law.

The basic presumption of the Section 17537.6 is that it is misleading to the the public -- to a consumer that recording a homestead declaration can "in any manner" - I think that's a key phrase -- "in any manner can prevent the sale of someone's home".

THE COURT: It says a heck of a lot more than that.

MR. HUGHES: I believe that is the basic

presumption of the statute.

THE COURT: That may be the presumption, but I have ruled time and time and time again that that section is constitutional, valid and not subject to your client's free speech objections.

MR. HUGHES: Okay. Well, if that's the case--

THE COURT: Have I not?

MR. HUGHES: Yes.

THE COURT: Have I not done so?

MR. HUGHES: Yes.

THE COURT: And you have that ruling up before the Court of Appeal. They have denied a Writ of Mandate, a Writ of Prohibition. They have denied a stay.

MR. HUGHES: Well, that's up before the Court again, but I would still like a ruling then just on one point. If the Court is not going to entertain any argument on the constitutionality of the statute I think Mr. Morse is entitled to at least understand how

there can be a ruling on the two causes of action which relate to misleading advertising when the State has failed to produce any evidence factual or legal that so much of a single word of his material is false and misleading.

THE COURT: The document that your client sends out says that recording a homestead may prevent a forced foreclosure of a home; is that correct?

MR. HUGHES: And Code of Civil Procedure Section 704.9-10 in sequence says that's an absolute true statement, absolutely.

THE COURT: So he says.

MR. BLAZER: Your Honor, that's not true. I mean, I think we've briefed this fairly well in our papers. You know, the problem that we have -- if Mr. Morse was saying you need to file a declared homestead because it will help in a voluntary sale and that gives you some added protection, we wouldn't have any problems with that or if they had just the

facts of that Webb v. Tibbett case. But to make this broad statement it's absolutely untrue for the reasons we've cited.

THE COURT: I'm not sure it's untrue, but it certainly is somewhat misleading.

MR. BLAZER: Right. That's correct. And, you know, I mean, the other thing is he has the standard wrong on the 17500 action. We don't have to show that anybody was deceived. It's "likely to be deceived". I'd just like to point that out. But, you know, people have this same right with the automatic homestead exemption that they do with the declared homestead so to say -- to in some way imply that you have more by filing this homestead is not true and also, you know, it creates the impression to homeowners that simply by filing this thing you're protected in all instances and that certainly is not true.

THE COURT: Let me ask you something, Counsel, do you concede that as the statute is

written that your client violated Section 17537.6?

MR. HUGHES: I would concede that he has failed to comply with various aspects of that statute.

THE COURT: Okay. I'll tell you what I'll do because I don't think it makes any difference for purposes of your appeal. I am going to grant summary adjudication of the first cause of action in favor of the State and the County. That is the violation of Section 17537.6. Just to keep this clean I will deny the summary adjudication as to the second and third causes of action.

Now, where did you come up with $800,000? Why not 700,000? Why not two million? Did you just kind of throw some numbers up in the air and whatever fell first that's the one you picked? Give me a rationale for the 800,000 versus 750 versus 900,000 versus any number that you can dream up.

MS. KAPLAN: Well, I think we were trying to

figure out -- I mean, he had indicated in the discovery that we have received from the Defendant that he had sent out over four million of these things and that as a result of that he had benefited at least in terms of gross income in an amount of over two million dollars. And obviously trying to figure an appropriate penalty figure is not an exact science, but looking through the cases it seemed to us that if we were to assess a penalty of somewhere in the area of 20 cents per violation which would -- which would be the four million figure that we'd be at $800,000.

THE COURT: Does that have any relationship to what you consider the profit he made --

MS. KAPLAN: Well --

THE COURT: -- on two million dollars?

MS. KAPLAN: -- no, we've never been able to figure out what profit he's made.

MR. BLAZER: He's always refused to give us any information on that.

MR. HUGHES: Your Honor, if I may respond?

THE COURT: Go ahead.

MR. HUGHES: They have in their possession and they have had in their possession for sometime the banking records of the Defendant relating to homestead declarations. You don't have to be a mental giant to be able to pick up a bank statement and calculate the amount of monies brought in and the amount of monies going out to figure out fairly easily what the profit is.

THE COURT: Good. What was the profit? You figured it out.

MR. HUGHES: I haven't figured it.

THE COURT: Oh, you haven't figured it out?

MR. HUGHES: No.

THE COURT: Mr. Morse wouldn't be in this business unless he was making a profit, would he?

MR. HUGHES: I'm not going to say there wasn't any profit to be made.

THE COURT: It has to be a substantial

profit in order to send these things out by the millions and doing, what, 80, 90,000 of these homesteads?

MR. HUGHES: I don't believe it's a substantial profit.

THE COURT: Well, what do you consider substantial?

MR. HUGHES: I don't know what his profit is, Your Honor.

THE COURT: I see.

MR. HUGHES: That hasn't -- I think probably the best way to handle it is if there's going to be a judgment I think he's entitled to a hearing on the damages or a hearing to determine factually how much he's made. They both know and we've had numerous discussions and they have the banking records that the percentage of profit is very small.

MR. BLAZER: That's not true.

THE COURT: Wait a minute. If they know you must know.

MS. KAPLAN: No.

MR. HUGHES: I don't have the burden of proof here. I haven't had any reason to go through with an accountant. They carry the burden of proof as to the issue of damages. We've been obligated to provide the documentation. We have provided that documentation.

THE COURT: Well, let my ask you something. The statute calls for up to $2500 for every violation. I haven't exactly multiplied 2500 times two million. Do you feel 20 cents a violation is excessive?

MR. HUGHES: I think it would be inappropriate for me to state my opinion because I don't believe that's my call. I believe that's the Court's call.

THE COURT: Well, you're objecting, are you not? I want to know the basis of your objection.

MR. HUGHES: What I'm saying is that for the Court to -- well, first of all, I think the Court is limited to the Complaint. The

Complaint in the case says $400,000 on first the two accounts.

MS. KAPLAN: Well --

MR. HUGHES: Basically what the Court has now done is the Court has granted summary judgment only on count one which limits the Court to $400,000 anyway because that's what's addressed in the Complaint. And you can't go beyond the Complaint in terms of civil damages. That's all they've asked for is $400,000.

MS. KAPLAN: Your Honor, I would disagree with that. The prayer in the Complaint asked for an amount no less than $400,000.

THE COURT: All right. All right.

MS. KAPLAN: May I?

THE COURT: Yes.

MS. KAPLAN: I would like to make a procedural point, Your Honor. The tentative ruling indicated that the penalties that it's your intention to impose actually be deposited in that Consumer Prosecution --

THE COURT: Protection --

MS. KAPLAN: Protection --

THE COURT: -- Trust Fund.

MS. KAPLAN: -- Trust Fund. I don't believe that that's the way it can be done.

THE COURT: Isn't that what you asked for?

MS. KAPLAN: I asked for -- or rather we asked for a certain amount of penalties and then we asked for a certain amount of restitution and the restitution can be taken by the Court and in a side-pray context put into that trust fund. But the law seems to be relatively clear that penalties have to go to the State and the County and I'm looking at Business and Professions Code Section --

THE COURT: Well, certainly we're not going to try to send 20 cents or a portion of 20 cents to each of four million people --

MS. KAPLAN: I agree.

THE COURT: -- considering it's costing us a 29 cent stamp to start the ball rolling.

MS. KAPLAN: I agree and that's why we

suggested if there was going to be an order of restitution it actually be placed in this trust fund.

THE COURT: However, some portion has to go to the State.

MS. KAPLAN: Yeah. I mean, there have to be penalties and the penalties have to be going to the County and the State divided equally according to 17206 and 17536. And so it's our suggestion that you perhaps take half that 800,000 and designate it as restitution and it could go to that trust fund and the other half be designated to penalties to be split by the State and the County or 600,000 as penalties to the State and County and 200 in restitution. That would be your call.

THE COURT: Yes, and your being from the State and County and wanting to enrich the State and County you would suggest you place those more in the coffers --

MR. BLAZER: No, actually --

THE COURT: -- than into the fund that pays

restitution to people who have been wrong -- what does the Consumer Restitution Fund go for; what does that do; who applies to that fund?

MS. KAPLAN: Basically different consumer protection agencies and prosecutors throughout the state. I know some money has gone to legal aid offices that are interested in doing some consumer protection litigation. I think some various District Attorneys' offices and trustees for a grant of money for investigation costs in certain large cases.

THE COURT: So it doesn't go to a consumer?

MS. KAPLAN: No, it's not actually --

MR. BLAZER: It's used on behalf of the consumers.

MS. KAPLAN: Right. It's the next best use for the monies.

THE COURT: So this is you get it now or later basically this money?

MS. KAPLAN: Right.

MR. BLAZER: Well, not --

THE COURT: No matter what I do with it the County and State is going to end up with it?

MR. BLAZER: Not necessarily, because other entities, you know, legal entities, other consumer entities would get it.

THE COURT: All right.

MS. KAPLAN: Can I just make one more comment?

THE COURT: Yes, ma'am.

MS. KAPLAN: I don't know if you want to hear anymore argument on the issue of the amount of penalties, but I would just like to make one statement if you're interested at all.

THE COURT: Well, I'm interested and I'm sure the Court of Appeal would be interested. There must be some basis here for this.

MS. KAPLAN: See, first of all, I think the Court may look to various factors such as whether the conduct was intentional. You know, we've indicated in our summary judgment motion that we both wrote letters early on to

the Defendant indicating the conduct was illegal and asked him to stop. He didn't do that. You know, he's violating the terms of the injunction which makes the conduct intentional. You know, he's admitted that he sent this to four million people. That he's made at least two million dollars.

And as Mr. Blazer was saying it's true that, you know, the determination of penalties is not an exact science, but I think since he has -- since the Defendant has refused to give us any information to, you know, let us know about the profit and that sort of thing we tried to be very conservative in the amount that we asked and, you know, we figured that 20 cents per violation was a very, very conservative amount of money. I mean, I guess we could have asked for 30 cents as opposed to 20 cents or, you know, 25 cents, you know, whatever. But what we tried to do was to punish the conduct but not -- you know, trying to be conservative and that's how we came up

with this figure.

It's also within the Court's discretion to order over two million dollars in restitution.

MR. BLAZER: Without any indication of, you know, how much he made off of the business or that sort of thing.

THE COURT: All right. The Court would order that the summary adjudication be granted as to the first cause of action, denied as to the balance second and third cause of action.

The Court would order that the sum of $200,000 be paid to the County of Alameda, $200,000 to the State of California and $400,000 restitution to the Consumer Protection Trust Fund as side-pray restitution.

MR. BLAZER: Thank you, Your Honor.

MS. KAPLAN: You have -

MR. HUGHES: Your Honor --

MS. KAPLAN: -- you have our proposed order before you, Your Honor.

THE COURT: I may or may not. Most of the file is with the Court of Appeal of the Appeals Section so I have an unbundled --

MS. KAPLAN: Okay. And --

THE COURT: -- set of documents here.

MS. KAPLAN: -- and I have a new original if I could give it to you.

THE COURT: All right.

MR. HUGHES: Your Honor, before the Court entertains the order, on a procedural matter are the People going to pursue the remaining two claims which are not subject to the summary judgment motion or are they going to dismiss those; what are they going to do procedurally?

MS. KAPLAN: Do we have to make that decision right now?

THE COURT: I don't believe you do.

MS. KAPLAN: I don't think so.

MR. HUGHES: Okay. So the trial date has not been vacated?

THE COURT: That's right. So the discovery

motions are still alive and the trial date is still in effect. I would suggest to save time, effort and money that maybe those causes of action could be dismissed without prejudice.

MR. HUGHES: The question that I would have--

THE COURT: Just to stop the outflow.

MS. KAPLAN: Right.

MR. HUGHES: -- the question that I have is that there's already been a factual finding of this Court as to what the damages are and the restitution in civil penalties. I'm not sure what the point would be in continuing on to a trial.

THE COURT: Well, I think I agree with you and that's why I'm saying that my suggestion -- certainly I have no power to do it -- is to dismiss without prejudice.

If the Court of Appeal or the Supreme Court finds differently than I did on the first cause of action then the second and third can

always be reawakened.

MS. KAPLAN: I think we agree with both of you after some small amount of thought. I think we will probably do just that.

THE COURT: All right.

MS. KAPLAN: Your Honor, and one final thing just for purposes of clarity. Is it correct to say that the terms of the permanent injunction at least insofar as they are prohibitory are not stayed pending appeal?

THE COURT: No.

MS. KAPLAN: Thank you.

THE COURT: I believe that as I indicated when it came to the preliminary injunction, the TRO on the preliminary injunction, I refused to stay it. There also leaving it to the Court of Appeal which has the jurisdiction to stay my court order. They chose not to.

MS. KAPLAN: Okay.

THE COURT: So I think also in this case it is up to them if they feel there is some basis to stay the injunction they can do so.

MR. BLAZER: Thank you, Your Honor.

MS. KAPLAN: Thank you, Your Honor.

DENISE GRAHAM, CSR# 7897

STATE OF CALIFORNIA)
COUNTY OF ALAMEDA) ss.
CERTIFICATE OF REPORTER)

I, DENISE GRAHAM, Certified Shorthand Reporter, do hereby certify that I am an Official Court Reporter of the Superior Court of the State of California, and that, as such, I reported the proceedings had in the above-entitled matter at the time and place set forth herein;

I further certify that my stenographic notes were thereafter transcribed into typewriting under my direction, and that the foregoing pages numbered 1 through 16 constitute a full, true and correct transcription of said notes in the above-entitled proceedings.

Dated at Pleasanton, California, this 31st day of December, 1992.

_____

DENISE GRAHAM, C.S.R. NO. 7897

DENISE GRAHAM, CSR# 7897

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, EASTERN DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

IVAN O.B. MORSE individually, and doing business as MORSE AND ASSOCIATES, and DOES ONE through TWENTY, inclusive,

Defendants.

Case No. H-156662-0

SUMMARY JUDGMENT AND PERMANENT INJUNCTION

Plaintiff's Motion for Summary Judgment, and alternatively, for Summary Adjudication came on regularly to be heard in Department 50, of the above-entitled court, before the Honorable Mark Eaton on November 9, 1992. Laura W. Kaplan and Lawrence C. Blazer appeared on behalf of plaintiff, People of the State of California, and Ralph D. Hughes appeared on behalf of defendant Ivan O.B. Morse.

The court having considered the pleadings and evidence, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's Motion for Summary Adjudication of the first cause of action (violation of B & P 17537.6) is granted. A review of all papers filed herein establishes there are no triable issues of material fact existing as to plaintiff and defendant Ivan O.B. Morse, and plaintiff is entitled to Summary Judgment as a matter of law.

2. This court has jurisdiction of the subject matter of this action hereof and the parties which have appeared.

3. The provisions of this Permanent Injunction pursuant to Summary Judgment are applicable to defendant Ivan O.B. Morse, and Morse and Associates, their agents, servants, employees, partners, associates, representatives, and all other entities or persons acting in concert with them or any of them with actual or constructive notice of this Permanent Injunction.

4. Defendant Ivan O.B. Morse and Morse & Associates, and said persons, entities and representatives set forth in paragraph 3, above, are hereby perpetually enjoined and restrained pursuant to Business and Professions Code sections 17537.6 and 17535, from doing, or attempting to do, or causing to be done, either directly or indirectly, by any means, method or device, any and all of the following acts or practices, when sending

written homestead solicitations (offers to perform assistance to homeowners regarding the preparation of homestead declarations) to members of the public:

(a) Failing or refusing to place the disclosure specified in Business and Professions Code section 17537.6(b)(1) in 12-point boldface type in a box formed by a heavy line at the top of every advertisement or promotional material disseminated by defendant as required by Business and Professions Code section 17537.6(b)(2);

(b) Representing that by preparing and recording a declared homestead, homeowners may prevent the forced sale of their homes to satisfy debts, in violation of Business and Professions Code section 17537.6(a)(1);

(c) Representing, explicitly or implicitly, in violation of Business and Professions Code section 17537.6(a)(3), that any of the statutory protections relating to the homestead exemption, commencing with Code of

Civil Procedure section 704.710, are only available to persons who prepare or record a declared homestead;

(d) Failing or refusing to deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant but no later than ten days after the homestead declaration is notarized, as required by Business and Professions Code section 17537.6(c);

(e) Failing or refusing to pay all fees charged in connection with the notarization and recordation of the homestead declaration as required by Business and Professions Code section 17537.6(c);

(f) Charging, demanding or collecting any money until after the homestead declaration is recorded, as prohibited by Business and Professions Code section 17537.6(d);

(g) Charging, demanding or collecting any sums in excess of $25, including all fees for

notarization and recordation, as prohibited by Business and Professions Code section 17537.6(d);

(h) Using an envelope to send homestead solicitations to homeowners on which the nameof a lender appears.

(i) Making untrue or misleading statements in any manner in connection with the offering or the performance of homestead declaration preparation services.

5. Defendant Ivan O.B. Morse shall pay plaintiff the sum of $400,000.00 as and for civil penalties pursuant to Business and Professions Code section 17536. This amount shall be paid by check made payable one-half to the order of the Attorney General of the State of California, delivered or to the attention of Deputy Attorney General Laura W. Kaplan, Office of the Attorney General, 1515 K Street, Suite 511, Sacramento, California 95814, and one-half to the order of the Treasurer of Alameda County, delivered to the

Consumer and Environmental Protection Division, Alameda County District Attorney's Office, 7677 Oakport Street, Suite 400, Oakland, California 94621.

6. Defendant Ivan O.B. Morse shall make cy pres restitution by paying the sum of $400,000.00 to the Consumer Protection Prosecution Trust Fund. This amount shall be paid by check and delivered to either the Office of the Attorney General or the Office of the District Attorney, at the locations described above.

7. Defendant Morse shall maintain, for three years, all documents including, but not limited to, all books, ledgers, accounts, correspondence, memoranda, contracts, solicitations, advertisements and any other documentation in their possession or under their control which relate to any matters contained in this Judgment or to the Complaint filed in this action.

8. This permanent injunction pursuant to

Summary Adjudication shall take effect immediately upon it's entry.

9. Jurisdiction is retained for the purpose or enabling any party to this Injunction to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of any of the injunctive provisions of this Judgment, for the modification of any or all of the injunctive provisions for the enforcement of such provisions, and for the punishment for any violations.

10. Summary adjudication is denied as to the second and third causes of action. Triable Issues of Fact exist as to whether statements made in the "Homestead Information Sheet" were misleading. See Plaintiff's Exhibit 2(b) in support of motion.

DATED: NOV. 23, 1992

MARK L. EATON
JUDGE OF THE SUPERIOR COURT

First Appellate District, Division 3,
No. A058935/A060033
S037673

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

IVAN O.B. MORSE, Appellant

And Companion Case

Appellant's petition for review DENIED.

LUCAS
Chief Justice

SUPREME COURT
FILED
MAR 17 1994
ROBERT WANDRUFF

CLERK DEPUTY